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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BRENDA M. LOPEZ,

Plaintiff and Appellant,

v.

DAVID R. GRIFFITH,

Defendant and Respondent.

F056628

(Super. Ct. No. 620802)

OPINION

APPEAL from an order of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of Alexander Lebecki and Alexander Lebecki for Plaintiff and Appellant.

Segal & Kirby and John T. Kinn for Defendant and Respondent.

-ooOoo-

This is an appeal from an order granting an anti-SLAPP motion brought by defendant and respondent David R. Griffith. (See Code Civ. Proc., § 425.16, subd. (i) [order granting or denying special motion to strike is an appealable order].)¹ Plaintiff and appellant Brenda M. Lopez contends the trial court erred in concluding that the anti-SLAPP statute was applicable in this case and that she had not established a probability she would prevail on the merits of her causes of action. We will conclude the trial court did not err and, accordingly, will affirm the order striking all of the causes of action against respondent.

Facts and Procedural History

Appellant was a party in an action for dissolution of marriage. (See *Lopez v. Lopez* (Orange Co. Super. Ct., No. D 25 84 34).) She subpoenaed certain information from Underwriters Laboratories, Inc. (UL), concerning a fire retardant for which appellant's spouse held the patent. Appellant eventually was awarded the patent in the dissolution action.

The patented fire retardant product, known as FR-3500, was used by defendant Thunderbolt Wood Treating Co., Inc. (Thunderbolt) pursuant to a license granted by appellant's former spouse. After being notified about the subpoena, Thunderbolt filed an objection to release of information pursuant to the subpoena on the basis the documents would disclose Thunderbolt's trade secrets. Thereafter, appellant and Thunderbolt executed a document entitled "Stipulated Protective Order and Confidentiality Agreement." The family law court entered a protective order in accordance with the agreement.

¹ All further section references are to the Code of Civil Procedure. Although other trial court defendants are named as respondents in the notice of appeal and the briefs, the order in question concerns only the causes of action against David R. Griffith. The other defendants are not involved in the present appeal.

Appellant formed a corporation, A.A.C. Chemical, Inc. (hereafter the corporation) in association with her then-attorneys (hereafter the attorneys) for administration of her patent rights for FR-3500. On behalf of the corporation, one of the attorneys sent a demand letter to Thunderbolt, contending Thunderbolt was not paying royalties required by the license. Thunderbolt, represented by respondent, filed suit against appellant, the attorneys, and the corporation, contending the demand letter constituted a violation of the confidentiality agreement. (See *Thunderbolt Wood Treating Co. Inc. v. A.A.C. Chemical, Inc. et al.* (Stanislaus Co. Super. Ct. No. 251869) [hereafter referred to as the underlying litigation].) Thunderbolt obtained a preliminary injunction against appellant and the other defendants in that action.

Eventually, the other defendants in the underlying action stipulated to entry of a permanent injunction against them, but appellant contested the matter. Appellant sought unsuccessfully to have the preliminary injunction dissolved or modified, and the parties began discovery. After a time, no party took any action to bring the case to trial and, with the approach of the five-year deadline for bringing the case to trial (see § 583.310), Thunderbolt dismissed the action against appellant without prejudice on December 14, 2004.

Appellant filed the complaint in the present case on December 8, 2006. In addition to causes of action against Thunderbolt and its officers, the complaint included causes of action against respondent for conspiracy (fifth cause of action), malicious prosecution (sixth cause of action), and “malicious abuse of legal process” (seventh cause of action).

Respondent filed a special motion to strike pursuant to section 425.16.² Respondent contended his actions in representing his clients constituted constitutionally

² A special motion to strike is authorized when a defendant contends an action is a so-called SLAPP lawsuit. The acronym stands for “strategic lawsuit against public participation.” Code of Civil Procedure section 425.16, subdivision (b)(1) provides for

protected free speech and petition activities and that appellant could not demonstrate a probability of prevailing on her causes of action. He contended, among other claims, that he did not act with malice. Appellant contended the requisite malice was demonstrated when respondent, “through false statements before the court, attempted - and succeeded - in allowing Defendant THUNDERBOLT to use Plaintiff’s [patented] formulation with impunity and in intentionally preventing Plaintiff from enjoying the benefits of her own patent property rights.”

The court granted respondent’s motion to strike. It concluded respondent had established the applicability of the anti-SLAPP procedures, thereby shifting to appellant the burden of establishing a probability she could succeed on her causes of action. The court concluded appellant had failed to do so. First, “conspiracy” was not a separate tort that would support a cause of action, so the fifth cause of action could not succeed. Second, appellant failed to present evidence that respondent harbored the “specific intent to do [appellant] harm,” a necessary element of the remaining causes of action. Accordingly, the court granted respondent’s motion.

Appellant filed a timely notice of appeal.

Discussion

Appellant contends for the first time on appeal that respondent’s actionable conduct was “illegal” and that, as a result, respondent is not entitled to invoke the anti-SLAPP procedure to terminate her lawsuit. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) Respondent does not contend appellant has waived the issue by not raising it below. Accordingly, we will briefly address the substance of appellant’s contention.

dismissal of a cause of action arising from constitutionally protected petition or free speech activities “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

Initially, appellant contends *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728 stands for the proposition that a defendant who is sued because of “[s]tatements which were clearly made maliciously and without probable cause,” as appellant’s brief describes them, cannot seek protection through an anti-SLAPP motion. In fact, *Jarrow* held essentially the opposite: “[T]he Court of Appeal held that this action, which is based on allegations that [defendants] maliciously and without probable cause brought and maintained a cross-complaint against [plaintiff] in the course of a civil lawsuit, is subject to anti-SLAPP scrutiny. [¶] ... [¶] [T]he Court of Appeal unquestionably was correct.” (*Id.* at p. 734.)

It is, nonetheless, true that the Supreme Court has held that a defendant is not entitled to bring an anti-SLAPP motion where it is established that the defendant’s conduct was illegal and, therefore, was not protected constitutional free speech or petition activity. (See *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 320.) This exception set forth in *Flatley* is very narrow; it applies only where the defendant concedes or the evidence conclusively establishes that the conduct was illegal. Here, respondent contends the statements made in the underlying litigation were true and the evidence does not establish, conclusively or otherwise, that the statements were made in that proceeding with the necessary state of mind to make them perjurious or otherwise illegal. It is particularly noteworthy that appellant was unable to demonstrate the falsity of those statements in her effort to dissolve the preliminary injunction. Appellant has not demonstrated that respondent was precluded from bringing an anti-SLAPP motion by the doctrine of *Flatley v. Mauro*, *supra*, 39 Cal.4th at page 320.

Appellant also contends that, even if respondent was permitted to file an anti-SLAPP motion, appellant nevertheless established a probability she would prevail on the

malicious prosecution cause of action.³ This contention has two components, neither of which has merit. First, based on her interpretation of the confidentiality agreement, appellant infers that respondent acted with the requisite malice in instituting and pursuing the underlying litigation, using clearly false representations to “paralyze Appellant regarding any claims against Defendant Thunderbolt for patent infringement.” Second, appellant contends respondent lied when he said in his anti-SLAPP supporting declaration that he did not know appellant; as a consequence of this lie, says appellant, “the court may consider that the party has lied about all other matters as well.” Appellant concludes: “The order granting Respondent’s motion was based on perjurous [*sic*] testimony and should accordingly be reversed.” We address the two prongs of appellant’s argument separately.

The first prong of appellant’s argument, as noted, is based on her construction of the terms of the confidentiality agreement. Appellant says the agreement pertained only to UL file Nos. R16304 and R16305, which were the UL files concerning certification of her patented FR-3500 fire retardant. Further, she says, respondent represented to the court in the underlying litigation that other UL files, Nos. R16063 and R16064 (concerning certification of Thunderbolt’s derivative, proprietary fire retardant) were covered by the agreement and that this representation clearly was false, as demonstrated

³ Appellant does contest the court’s ruling on the conspiracy cause of action. The trial court order did not distinguish between the necessary elements for the tort of malicious prosecution and the tort of abuse of process. (See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 469, p. 696 [elements of malicious prosecution]; *id.* at § 521, p. 771 [elements of abuse of process].) Instead, the court concluded: “As to the sixth and seventh causes of action, the Court finds ... [respondent] did not harbor a specific intent to do [appellant] harm. Indeed, [respondent’s] declaration reveals that [he] did not even know [appellant].” Appellant contends that the court erroneously found the “absence of specific intent to harm” appellant. Appellant does not rely on or discuss any separate requirements for an abuse of process cause of action, and we deem any distinct challenge to have been waived.

by reference to the plain language of the confidentiality agreement. Thus, appellant argues, the clear falsity of statements submitted by respondent in the underlying litigation permits an inference that respondent acted with malice.

It does not appear appellant's interpretation of the confidentiality agreement is correct; moreover, it is certain that respondent's interpretation is not so wholly lacking in substance as to support an inference of malice.

The relevant passage from the confidentiality agreement is the following lengthy sentence: "All information provided to Petitioner by THUNDERBOLT or produced by Underwriters Laboratories, Inc., which relate in any way to THUNDERBOLT, either directly or indirectly, in the form of documents, verbal communications, testimony, or electronically stored data, including, but not limited to, information related to THUNDERBOLT's fire retardant wood treatment process, testing, test results, chemical formulas, product composition, client list, financial data, or any kind of data, information or evidence which refers, relates, constitutes or pertains to THUNDERBOLT, and contained in UL File Nos. R16304 and R16305, is hereby deemed 'Confidential' under the terms of this Stipulated Protective Order (hereinafter 'Order')."

Admittedly, this is not a simple sentence. It is, however, arguably composed of two distinct parts. First, "[a]ll information provided to Petitioner ... which relate[s] in any way to THUNDERBOLT, ... including, but not limited to, information related to THUNDERBOLT's fire retardant [product]" is confidential. Second, "any kind of data, information or evidence which refers, relates, constitutes or pertains to THUNDERBOLT [and is] contained in" the specified UL files is confidential. While this construction of the confidentiality provision is not supported by a strict reading of the grammar of the sentence (this reading interpolates the word "or" between "client list" and "financial data"), a strict reading of the sentence does not support appellant's contention that the only confidential information is that contained in the two specified files. If appellant's construction were correct, it would render superfluous the introductory portion

concerning “[a]ll information provided to Petitioner by THUNDERBOLT” since Thunderbolt did not provide the specified files to appellant at all.

We are not called upon in this case to definitively construe the confidentiality provision. It is sufficient here to conclude that the construction of the provision reflected in respondent’s filings in the underlying litigation is a reasonable construction. Pursuant to that construction, UL file Nos. 16063 and 16064, which contain information about the testing and the properties of Thunderbolt’s product, clearly would be confidential under the agreement. Because this construction is, at the least, one reasonable interpretation of the confidentiality agreement, respondent’s reliance on this interpretation in the underlying litigation does not support an inference of malice or other state of mind that would support a claim either for malicious prosecution or abuse of process.

The second prong of appellant’s argument is that the trial court erred in concluding that respondent’s declaration in support of the motion to strike “overwhelmingly” established that respondent did not know appellant and “did not harbor a specific intent to do ... harm” to appellant. Appellant says it is obvious respondent knows her because respondent negotiated the confidentiality agreement with her former attorney and respondent took her deposition in the underlying litigation. Since he obviously does know appellant, respondent has lied in his declaration, permitting all of his testimony to be deemed false, according to appellant.

Appellant has construed both the trial court’s and respondent’s statements in an unreasonable manner. Both statements clearly were meant to indicate that respondent had no social or personal relationship with appellant that might permit an inference that respondent was functioning outside the ordinary bounds of an attorney acting on behalf of his client, Thunderbolt.⁴ Appellant has pointed to no evidence--and, indeed, does not

⁴ Respondent’s declaration in support of the anti-SLAPP motion states, in relevant part: “I do not know BRENDA LOPEZ. At no time before, during or after the [underlying litigation] did I bear her any ill will or malice. [¶] ... The [underlying litigation] was

contend--that there is any personal animus between appellant and respondent, and the present record does not support an inference that respondent's declaration was false.

Appellant has not demonstrated that she can produce evidence that would support a favorable determination of any of her causes of action.

Disposition

The order striking appellant's complaint, insofar as it alleges causes of action against respondent, is affirmed. Respondent is awarded costs on appeal.

VARTABEDIAN, Acting P. J.

WE CONCUR:

HILL, J.

POOCHIGIAN, J.

filed and pursued against BRENDA LOPEZ and the other Defendants solely because I believed (and still believe) it had legal and factual merit and for no other ulterior motive."